FEDERAL ELECTION COMMISSION

11 CFR Parts 100, 104, 114, and 116

[Notice 1990—10]

Debts Owed by Candidates and Political Committees

AGENCY: Federal Election Commission.

ACTION: Final rule; Transmittal of Regulations to Congress.

SUMMARY: The Commission has deleted its regulations at 11 CFR 114.10 and has prepared new 11 CFR part 116 concerning the extension of credit and settlement of debts owed by candidates and political committees. These regulations implement sections 433, 434, 439a, 441a, 441b and 451 of the Federal Election Campaign Act of 1971, as amended ("the Act" or "FECA"), 2 U.S.C. 431 *et seq.* In addition, the Commission has made several corresponding amendments to 11 CFR 100.7(a), 104.3(d) and 104.11(b) to bring those provisions into conformity with new 11 CFR part 116. Finally, the Commission is preparing a new form to facilitate the submission of debt settlements, which will be transmitted to Congress at a later date. Further information on these revisions is provided in the supplementary information which follows.

EFFECTIVE DATE: Further action, including the announcement of an effective date, will be taken after these regulations have been before Congress for 30 legislative days pursuant to 2 U.S.C. 438(d). A document announcing the effective date will be published in the Federal Register.

FOR FURTHER INFORMATION CONTACT: Ms Susan E. Propper, Assistant General Counsel, 999 E Street NW., Washington, DC 20463, (202) 376–5690 or (800) 424–9530.

SUPPLEMENTARY INFORMATION: The Commission is publishing today the final text of new regulations at 11 CFR part 116, which concern debts owed by candidates and political committees. The new rules replace current § 114.10, which is being removed from 11 CFR. In addition, the Commission is publishing conforming amendments to §§ 100.7, 104.3 and 104.11 to reflect the new provisions in part 116 of the regulations.

On December 6, 1988 the Commission issued a Notice of Proposed Rulemaking (NPRM) is which is sought comments on proposed revisions to these regulations 53 FR 59193. Seven written comments were received in response to the Notice. A public hearing was held on February 15 and 16, 1989 at which four witnesses presented testimony on the issues raised in the rulemaking.

Section 438(d) of title 2, United States Code requires that any rules or regulations prescribed by the Commission to carry out the provisions of title 2 of the United States Code be transmitted to the Speaker of the House of Representatives and the President of the Senate thirty legislative days before they are finally promulgated. These regulations were transmitted to Congress on June 22, 1990.

Explanation and Justification

The Commission has extensively revised and reorganized its regulations regarding debts owed by candidates and political committees to ensure that the creation and settlement of such debts do not result in excessive or prohibited contributions to the debtor committees, and to promote the timely public disclosure of such transactions. During the course of this rulemaking, the Commission has re-examined several fundamental issues regarding debts owed by political committees, such as which types of committees should be permitted to seek debt settlement, whether debt settlements should be reviewed as agreements are reached or only after all creditors have ratified settlements, the scope of the Commission's review of debt settlements, and the relationship between the Commission's procedures and the procedures established by Congress in the Federal Bankruptcy Code.

The principal areas in which new 11 CFR part 116 differs from the previous language of 11 CFR 114.10 are as follows:

(1) Under the new rules, ongoing committees will no longer be permitted to settle debts (*see* 11 CFR 116.2).

(2) New procedures are included regarding situations in which either the political committee's creditors have gone out of business (*see* 11 CFR 116.9) or the political committee is essentially defunct (*see* 11 CFR 116.8).

(3) Special provisions have been added regarding authorized committees (including authorized committees of publicly-funded Presidential candidates) that wish to settle debts, terminate, or assign debts to other committees authorized by the same candidate (*see* 11 CFR 116.2(c)).

(4) New provisions have been added which address debts owed to unincorporated commercial vendors (*see* 11 CFR 116.3 and 116.4), committee employees (*see* 11 CFR 116.6), or other individuals who have advanced funds to or on behalf of a political committee (*see* 11 CFR 116.5).

(5) A more complete explanation of the procedures for submitting debt settlements for Commission review and a more detailed list of the information that must be provided have been added. (*see* 11 CFR 116.7).

(6) The treatment and reporting of disputed debts is clarified (*see* 11 CFR 116.10).

After considering the public comments and testimony regarding the Commission's role in bankruptcy proceedings under chapters 7 and 11 of the Federal Bankruptcy Code (11 U.S.C. Ch. 7 and 11), the Commission has decided to add a provision regarding the submission of debt settlement plans by terminating committees that have obtained releases from debts subject to chapter 7 bankruptcies. However, the new rules do not specifically address chapter 11 proceedings. Nevertheless, as explained more fully below, the promulgation of the new debt settlement rules may affect such proceedings.

The Commission has also decided to continue the current approach of permitting committees to file debt settlement requests as they reach agreements with creditors. Thus, the Commission is not adopting the previous proposals that would have required committees to present all their debt settlements at one time in a single unified plan for Commission review.

The Commission also notes that federal tax questions may arise concerning the proper treatment of bad debts owed to taxpayers by political parties or political committees. The reader should consult section 271 of the Internal Revenue Code regarding such matters. 26 U.S.C. 271.

Section 116.1 Definitions

New § 116.1 sets out definitions for the terms "terminating committee," "ongoing committee," "commercial vendor," "disputed debt," "extension of credit," and "creditor."

The previously proposed definition of "terminating committee" in paragraph (a) has been reworked to exclude committees that are continuing to make or accept contributions or expenditures for purposes other than winding down and paying outstanding bills. This is consistent with § 116.7(e)(6), which requires committees to demonstrate that they qualify as terminating committees. They should do so when they file their first debt settlement plan. The classification of a political committee as a terminating committee is of significance because only terminating committees are permitted to settle debts. While the new rules do not require terminating committees to terminate

within any set amount of time after they have settled all their outstanding debts, the Commission anticipates that most committees will file a termination report shortly after the Commission has concluded its debt settlement reviews. Failure to do so may raise questions about the committee's *bona fide* intent to terminate.

A definition of "commercial vendor" has been included in § 116.1(c) to clarify that debts owed to commercial vendors may be settled under these rules only if the vendor's usual and normal business involves providing goods or services of the type provided to the candidate or political committee. The Commission has modified the definition that appeared in the NPRM by deleting the language indicating that the provision of such goods or services must be "for profit." Transactions involving nonprofit entities and transactions between political committees will be addressed on a case-by-case basis. *See, e.g.* Advisory Opinion ("AO") 1989–4.

The Commission has also added a definition of "extension of credit." *See* 11 CFR 116.1(e). This term includes unintended credit which results when payment is due upon delivery but the political committee simply does not pay, as well as situations where the committee's creditor either decides in advance to provide goods or services on credit, or decides on or after the due date to allow more time for payment.

Finally, a new definition of "creditor" has been added to ensure that the term is correctly read to include both commercial vendors and other entities or persons, including individuals, to whom a debt is owed. *See* 11 CFR 116.1(f).

Section 116.2 Debts Owed by Terminating Committees, Ongoing Committees and Authorized Committees

The previous debt settlement regulations at 11 CFR 114.10 did not expressly limit debt settlements to political committees that are in the process of winding down their activities and preparing to terminate, although the vast majority of those seeking debt settlement are in that posture. Thus, questions arose as to the appropriateness of permitting ongoing committees, including party committees, separate segregated funds and nonconnected committees, to settle their debts for less than the full amount owed, particularly since these committees may have the ability and intention to continue soliciting funds for political purposes. Consequently, the NPRM sought comments on proposed regulatory language limiting debt settlements to political committees in the process of termination, and prohibiting ongoing committees from settling their previous debts.

The Commission heard testimony from one commenter who favored continuing to allow ongoing committees to seek debt settlements. The commenter stated that fairness to creditors would be promoted if the creditors could accept a generous settlement immediately, rather than being forced to wait substantially longer with little assurance that complete payment would be forthcoming. The commenter also pointed out that ongoing committees may have little choice other than to continue to support candidates and carry on normal operations while they are negotiating timetables for payment of previous debts.

The Commission has now decided to adopt the proposed language prohibiting ongoing committees from settling debts for less than the full amount owed. As the comment indicates, these committees have the intention to continue to solicit funds and to engage in election-related activities. Consequently, the settlement of an ongoing committee's debts cannot be considered to be commercially reasonable given that the committee is continuing to receive funds that could be used to pay its past debts. Moreover, by freeing additional funds for future electoral activity, such a practice could result in indirect corporate subsidization of a political committee's speech, and amplification of such speech beyond the committee's ordinary capacity. *Cf. FEC* v. *Massachusetts Citizens for Life*, 479 U.S. 238, 257–58 (1986) (individual contributions to political committees "reflect popular support for the political positions of the committee," while "corporate spending on political activity raises the prospect that resources amassed in the economic marketplace may be used to provide unfair advantage in the political marketplace"). Permitting settlement of an ongoing committee's debts is also inconsistent with section 433(d)(2) of the Act. That section contemplates the orderly application of a political committee's assets to reduce its outstanding debts only in the situation where the committee is insolvent and preparing to terminate.

Please note that under the new rules, "ongoing committee" includes party committees, separate segregated funds and nonconnected committees while such committees continue to engage in political activities. However, if a party committee, separate segregated fund or nonconnected committee decides to end its election-related activities, it may settle debts once it has qualified as a terminating committee.

Although the Commission has concluded that it is inappropriate to permit ongoing committees to settle debts, the Commission is adopting provisions that give ongoing committees the necessary flexibility to resolve certain concerns. Thus, ongoing committees may continue to resolve *bona fide* disputes with creditors regarding debts under new § 116.10. Ongoing committees, as well as terminating committees, will also be able to resolve difficulties created when their creditors have gone out of business. *See* 11 CFR 116.9. The Commission has also encountered the opposite situation, where the creditor is unable to locate the committee, or the committee is essentially defunct. Under certain limited conditions, the creditor may seek Commission approval of a complete forgiveness of the remaining debt. *See* 11 CFR 116.8.

The NPRM observed that there have been debt settlement requests in which different creditors were offered and accepted very different terms and payments from the same political committee. Thus, the NPRM sought suggestions as to whether the Commission should encourage political committees to pay each creditor approximately the same percentage for each outstanding debt. It also presented the possibility of establishing mandatory or suggested priorities for the settlement of debts owed to different categories of creditors and possibly requiring committees to adhere to the priorities set out in Federal Bankruptcy Code. *See* 11 U.S.C. 507. The Commission noted that section 433(d)(2) of the FECA refers to the Commission's authority to establish procedures to determine the insolvency of political committees, to liquidate the assets of insolvent committees for the reduction of outstanding debts, and to terminate insolvent committees after liquidation.

The commenters and witnesses at the hearing strongly opposed the creation of such priorities and pointed out several difficulties that the Commission could expect to encounter if it sought to oversee the liquidation of insolvent committees. It was also suggested that the Commission lacks the practical experience needed to resolve issues traditionally handled by the bankruptcy courts.

The Commission has now decided not to establish mandatory or suggested priorities for payment of creditors and not to implement new insolvency rules or procedures. Instead, the Commission will use its limited resources to ensure

that debt settlements presented to the Commission do not conceal transactions involving the making and acceptance of prohibited or excessive contributions.

The NPRM also sought comments on the related question of the Commission's role when an insolvent political committee files a petition under chapter 7 or chapter 11 of the Federal Bankruptcy Code. *See* 11 U.S.C. 301. In the past, the Commission has concluded that where candidates first sought release from dischargeable debts under chapter 7, the debts were settled for purposes of Commission review. *E.g.* Debt Settlement Request 87–11. The Commission received comments and testimony to the effect that the Commission should petition Congress to amend the Bankruptcy Code to permit the Commission to be notified, and if appropriate, to become a party in interest in bankruptcy cases involving political committees so that it could ensure compliance with the FECA. The comments preferred to let bankruptcy courts handle the liquidation or reorganization of a political committee's assets to the alternative of Commission supervision of insolvency proceedings for indebted committees. After further consideration, the Commission has decided that it should add language to the new rules to clarify how a release from dischargeable debts under chapter 7 affects the subsequent filing of a debt settlement plan by a terminating committee. *See* discussion below of new 11 CFR 116.7(g).

The reorganization of a political committee under chapter 11 presents many of the same concerns as are raised by the settlement of an ongoing committee's debts. As one federal bankruptcy court has acknowledged, such chapter 11 reorganizations implicate important policy considerations, such as the potential for the debtor committees to "deceiv[e] new donors by failing to inform them of the pending petition" for reorganization, as well as the "unfair advantage of chapter 11 political committees allowed to compromise debts while others may pay in full, and the potential for indirect corporate subsidization of a political committee's speech." *In Re: Fund for a Conservative Majority*, 100 Bankr. 307, 309 (Bankr. E.D. Va. 1989). The court concluded that some of the Commission's concerns in this area could be addressed by providing the Commission with an opportunity to review the reorganization plan submitted by the debtor committee. Unfortunately, the types of information needed to determine whether FECA violations have occurred may not be available in a committee's reorganization plan. While the new part 116 regulations prohibit ongoing committees from settling debts absent special circumstances, the new rules do not specifically address chapter 11 reorganizations involving political committees. Nevertheless, the Commission may seek to participate in bankruptcy cases presenting FECA questions and will continue to examine chapter 11 reorganizations of ongoing committees for evidence of FECA violations.

The NPRM also contained draft language that would have required terminating committees to submit all debt settlements as part of a single unified debt settlement package. This was intended to facilitate a more orderly review by the Commission of debt settlements and to enable the Commission to ascertain how the terminating committee plans to dispose of its remaining debts. This is a concern in situations where the committee had substantially more debts and obligations than cash on hand, and only limited fundraising prospects.

One commenter expressed the concern that the proposal for submission of all debt settlements in a single document would substantially delay creditors who reach settlements quickly from receiving any payments for lengthy periods of time while the political committee is negotiating agreements with all its other creditors.

In light of this concern, the Commission has revised §§ 116.2(a) and 116.7 so that the submission of all debt settlements in a single unified plan is not required. Thus, terminating committees may submit debt settlement plans in which agreements have been reached with some creditors but not others. However, the debtor committees will be required to include in their submissions summaries of their overall financial situation, including their plans for settling or resolving all remaining debts. This information is needed to enable the Commission to evaluate the commercial reasonableness of the debt settlements presented. In many cases, this approach will ensure that the details of a committee's earlier debt settlements will be placed on the public record more quickly than if the settlements were delayed until every creditor has signed an agreement to settle. Further information on submitting debt settlement plans and the scope of Commission review are explained below in 11 CFR 116.7.

New § 116.2(c)(1) prohibits authorized committees from settling debts if the candidate has another authorized committee with permissible funds available to pay part or all of the amount owed. This language also prohibits authorized committees from terminating if they have funds or assets to pay the outstanding debts of another authorized committee that cannot meet its own obligations.

The Commission received no public comments on proposed language in another section that expressly stated that the availability of funds to transfer from one authorized committee to another is a factor the Commission would consider in reviewing debt settlements. Such language has now been deleted since new § 116.2(c)(1) addresses this situation. Another comment expressed concern that new part 116 could well permit candidates to eliminate their previous campaign debts and then form new committees that would receive substantial extensions of credit from the same incorporated vendors, thereby allowing these candidates to put impermissible corporate contributions behind them. The language in new § 116.2(c) should alleviate such concerns. Moreover, the debt settlement review procedures set out in new § 116.7 will enable the Commission to question whether vendors have engaged in this type of activity with selected candidates, and to initiate enforcement actions in appropriate cases.

The new language in § 116.2(c)(1) regarding authorized committees parallels the provisions prohibiting ongoing committees from settling debts. The Commission notes that many candidates form a new principal campaign committee for each election cycle rather than simply rolling over their previous committee. Thus, a series of principal campaign committees is in many respects equivalent to an ongoing committee. The Commission has determined that the reasons for not permitting ongoing committees to settle debts should also prevent principal campaign committees from settling debts in situations where the candidate has another campaign committee capable of paying the amount owed.

For the same reasons, paragraph (c)(2) has been added to prohibit transfers of funds between a candidate's authorized committees for different elections if the transferor committee has net debts outstanding.

New paragraph (c)(3) has been added to assist authorized committees that would like to terminate but are unable to do so because they have outstanding debts which they are unable to pay. It permits indebted authorized committees to assign their debts to other authorized

committees of the same candidate and then terminate. Such assignments may not be made until after the election has been held, to prevent the formation of a new committee solely for the purpose of avoiding payment of debts. However, if either committee is an authorized committee of a Presidential candidate receiving public funding, the assignment may not take place until after the audit, repayment and enforcement processes have ended. The original committee must notify the creditors of the debt assignment. The authorized committee receiving the assigned debts must accept the obligation to pay the amount owed and must assume the reporting responsibilities for the assigned debts. This committee should report financial activity related to such debts and contributions received for their payment on a separate FEC Schedule A and Schedule D, but should include these figures in the totals reported on the committee's summary page. The Commission notes that contributions designated to pay the previous debts would be subject to the contribution limits for the previous election, rather than the upcoming election, under the net debts outstanding rules set forth in 11 CFR 110.1(b)(3). Thus, a separate schedule will assist the committee and the Commission in tracking these separate limits.

The concept of assigning debts is based in part on proposed activity approved by the Commission in AOs 1980–43 and 1977–52. One witness indicated that this approach would serve a useful disclosure function. Another commenter expressed the concern that the ability of the creditors of the committee accepting the assigned debts to obtain payment could be jeopardized by the committee's increased indebtedness. In practice, the Commission has not encountered such difficulties in the time since this approach was originally approved in AOs 1977–52 and 1980–43.

Another issue on which the NPRM sought comments was whether publicly-funded committees of Presidential candidates should be permitted to settle debts, and if so, whether higher standards should be used to evaluate their debt settlements. The NPRM also questioned whether such settlements should be submitted for Commission review as soon as practical, or whether the campaign committees should be permitted to wait until the Commission's audit process has been completed.

The Commission heard testimony from one commenter who proposed an alternative approach under which the contribution limits would be removed for Presidential candidates who are defeated and do not run again for President in the succeeding election. This would enable such indebted Presidential committees to seek additional contributions from those who have already given the maximum amount permitted under the Act. However, another commenter opposed this suggestion and argued that it would encourage more liberal campaign spending rather than responsibility and accountability. The Commission is not adopting the proposal regarding waiving the contribution limitations because this would be contrary to the plain wording of the statute as well as some of the basic principles underlying the FECA and the public financing statutes.

The Commission has now concluded that debts owed by publicly-funded Presidential committees should not be treated differently than debts owed by authorized committees of nonpresidential candidates. Thus, new § 116.2(c) of the Commission's regulations allows publicly-funded Presidential committees to settle debts if no other committee authorized by the same candidate has permissible funds available to pay the amounts outstanding. The indebted Presidential campaign committee is subject to the same requirements and procedures as other political committees eligible to settle debts. Furthermore, the original amounts of their debts will continue to be counted against their spending limits under 11 CFR 9035.1(a)(2). Under current 11 CFR 9038.2(b)(1)(v), the settlement of debts also reduces the indebted Presidential campaign committee's remaining entitlement to matching funds on its statement of net outstanding campaign obligations, which could affect the committee's repayment obligations. The new provisions in § 116.2(c) will not change this.

The Commission notes that questions were raised in Advisory Opinion 1988–5 as to whether a current publicly-funded Presidential committee may contribute or transfer funds to another publicly-funded committee of the same candidate for a previous election cycle to pay debts from the earlier campaign. The opinion concluded that such transfers or contributions are not qualified campaign expenses under 11 CFR 9034.4 and are not includable in the candidate's statement of net outstanding campaign obligations under 11 CFR 9034.5. However, such payments could be made from excess campaign funds once the audit process is concluded and any repayment or possible penalty obligations have been satisfied. Nothing in new 11 CFR part 116 would alter this conclusion.

Section 116.3 Extensions of Credit by Commercial Vendors

This new section generally follows previous § 114.10 by setting forth the standards for the extension of credit by corporations in the ordinary course of their business as commercial vendors. As under the previous rules, the failure to meet these standards results in an impermissible corporate contribution. New § 116.3 also adds corresponding standards for unincorporated commercial vendors who extend credit to candidates or political committees. An unincorporated vendor's failure to comply with these standards results in the making of a contribution subject to the dollar limits set forth in 11 CFR 110.1.

Paragraph (c) of § 116.3 lists the factors the Commission will consider in determining whether credit was extended in the ordinary course of business. These factors are intended to provide guidance so that commercial vendors and political committees may avoid situations resulting in the making or acceptance of excessive or prohibited contributions. The factors need not be accorded equal weight and in some cases a single factor may not be dispositive. In determining whether the ordinary course of business standard has been met, the Commission will also consider compliance or noncompliance with regulations issued by other Federal agencies.

One comment suggested that, instead of relying on these factors, the Commission adopt a presumption that a commercial vendor's credit arrangements reflect sound business judgment and that the presumption may be overcome with compelling evidence of a noncommercial motivation. The Commission has decided not to adopt this approach because it would provide committees and their creditors with little, if any, guidance as to what types of evidence would be evaluated or would be considered compelling.

Another witness at the public hearing suggested that it would be preferable for the Commission to rely upon judicial interpretations of the Federal Bankruptcy Code and the Internal Revenue Code regarding the meaning of "ordinary course of business," as well as the meaning of "commercially reasonable," a term which is used in § 116.4. Although the Commission will take these judicial interpretations into account in an appropriate case, these terms must be interpreted in light of the special focus of the FECA.

Section 116.4 Forgiveness or Settlement of Debts Owed to Commercial Vendors

Section 116.4 addresses the forgiveness or settlement of a political committee's debts owed to both incorporated and unincorporated commercial vendors. Previously, § 114.10 covered debts owed to corporations, but did not address debts owed to unincorporated commercial vendors. The forgiveness or settlement of such debts will result in the making of a prohibited corporate contribution or possibly an excessive contribution by an unincorporated vendor unless the debt settlement is commercially reasonable or unless the amount is not treated as a contribution under 11 CFR 100.7(b). In determining whether a debt settlement is commercially reasonable, the Commission will evaluate both the political committee's efforts to satisfy the debt and the creditor's efforts to obtain payment. However, the rules do not require the creditor or the debtor to undertake particular activities that are not likely to result in the reduction of the debt. For example, the commercial vendor is not required to go beyond its usual efforts to collect debts of similar amount from non-political entities.

One commenter questioned the validity of comparisons to non-political debtors and suggested instead that the Commission should focus on whether the vendor's actions were motivated by commercial or political considerations. The Commission recognizes that there are significant differences between political committees and other entities seeking to do business on credit, but believes that the standard suggested by the commenter is too subjective. Thus, reliance upon the "ordinary course of business" and "commercially reasonable" standards found in both the new rules and the previous regulations provides clearer guidelines for determining whether a commercial vendor's actions comply with the FECA than would be provided if the commenter's suggestion were adopted.

The Commission has revised the language of the previously proposed rules to clarify the political committee's obligations to make reasonable efforts to pay the debt and to comply with the debt settlement procedures specified in 11 CFR 116.7 and 116.8, including Commission review. *See* 11 CFR 116.4(c). Paragraph (d)(2) of § 116.4 lists the types of actions that the debtor committee may undertake to satisfy the reasonable efforts requirement.

Although the proposed rules had stated that a debt settlement would be considered commercially reasonable if the initial extension of credit was made in accordance with regulations issued by other agencies pursuant to 2 U.S.C. 451, this language has now been deleted to avoid creating the appearance that noncompliance with rules regarding such matters as reporting requirements of other agencies would automatically be viewed as not commercially reasonable. Nonetheless, regulations issued under section 451 may be used by the Commission as guidance in determining whether the activity in question was commercially reasonable under the FECA.

New paragraph (e) indicates that the Commission's regulations are not intended to force a commercial vendor to forgive or settle a political debt if the vendor does not wish to do so. This is consistent with the previous Commission practice of examining debt settlement statements for indications that creditors have agreed to the terms of the settlements. *See* Federal Election Commission Directive No. 3, Agenda Document #82–110 (effective July 22, 1982). Please note that a sentence has been deleted from the previously published version of paragraph (e) which merely restated the idea that committees and their vendors could agree to debt settlement or debt forgiveness.

In 11 CFR 116.4, new paragraph (f) has been added to clarify that the reporting obligations continue until the debt is paid, or until Commission review of the settlement or forgiveness is completed. This language parallels the corresponding reporting provisions in §§ 116.5 and 116.6, and is consistent with the continuous reporting requirements set out at current 11 CFR 104.11.

Section 116.5 Advances by Committee Staff and Other Individuals

New § 116.5 has been prepared to clarify the Commission's treatment of payments by individuals, including campaign staff, from personal funds and personal credit cards to purchase various goods or services for political committees with the expectation of subsequent reimbursement. The Commission has encountered situations, for example, where individuals have used, or sought to use, personal funds to purchase airfare, rental cars, meals, lodging, postage, office supplies, messenger services and a variety of other election-related items on behalf of political committees. *See, e.g.,* MUR 1349 and AO 1984–37. Although many campaign workers may only be able to advance relatively small amounts, individuals with sizable resources may have the ability to circumvent the contribution limitations by paying committee expenses and not expecting reimbursement for substantial periods of time. The Commission is concerned that this could occur during critical periods in a campaign when a candidate's authorized committee may be experiencing financial difficulties.

Under current § 100.7(b)(8), payments for personal transportation expenses incurred by individuals while traveling on behalf of candidates or political party committees are not contributions if they do not exceed $1000 per candidate per election or $2000 per year for the political committees of a political party. Personal funds used by volunteers for usual and normal subsistence expenses incidental to volunteer activity are also not considered contributions under 11 CFR 100.7(b)(8). However, payments by individuals for travel expenses that do not fall within these two exemptions are contributions under FECA.

The Commission has now decided to add new § 116.5 to clarify that payments by individuals using personal funds or personal credit cards to obtain goods or services for or on behalf of a political committee are contributions to that committee unless they fall within one of the exemptions set forth in § 100.7(b), as outlined above. In addition, this new provision sets out a limited exception for an individual's personal tranportation expenses, and for usual and normal subsistence expenses of an individual who is not a volunteer, where such expenses are incurred while the individual is traveling on behalf of a candidate or party committee. These exemptions only apply, however, if the individual's transportation and subsistence expenses are reimbursed within sixty days for credit card transactions or thirty days in other cases. On the other hand, an in-kind contribution will result if an individual pays the transportation or subsistence expenses of others or pays other types of campaign expenses, such as the costs of meeting rooms or telephone services, regardless of how long reimbursement, if any, takes.

The purpose of this provision is to provide flexibility in situations where individuals may find it necessary to pay personal travel and subsistence expenses. The Commission recognizes that campaign committees may not want to provide credit cards to their field workers. This regulation is also consistent with the treatment of credit card transactions in the public financing regulations. *See* 11 CFR 9035.2(a)(2).

One commenter testified that campaign staff should be able to make

advances of up to $500 for legitimate campaign expenses beyond the personal travel and subsistence expenses, provided the campaign reimburses the staff member within thirty or sixty days after receipt of a request for reimbursement. If such a request is not forthcoming, the campaign should seek it. The commenter argued that the expenses in question are usually for caterers, hotel rooms, and rental cars, not the staff's personal transportation or subsistence and, therefore, the commenter believed the proposed approach was simply too restrictive.

The Commission has decided not to adopt the commenter's suggested approach because it is inconsistent with the limited nature of the exemption from the definition of contribution in section 431(8)(B)(iv) of the FECA. Thus, under the final rules, advances made by individual staff members for expenses other than personal transportation or subsistence expenses are treated as in-kind contributions subject to the applicable contribution limits. Consequently, reimbursements for these nonexempt expenses are treated as refunds of the staff members' contributions.

Another commenter urged the Commission is extend this provision to committees other than campaign committees and party committees. The Commission believes that limiting this provision to candidates' committees and party committees parallels the transportation and subsistence exemption in section 431(8)(B)(iv) of the FECA. The Commission notes, however, that individuals may advance funds to separate segregated funds, and other unauthorized committees to the extent permitted by the contribution limits of the Act. *See* AO 1984–37 n. 2.

Paragraphs (b) and (d) of the new rule indicate that an unreimbursed payment must be treated as a debt and reported as such until the debt has been paid or settled or forgiven and the Commission's review of the debt settlement or forgiveness has been completed. The Commission wishes to emphasize that this rule does not require individual creditors to settle or forgive debts if they do not wish to do so.

A new "scope" paragraph has also been added to the final version of this regulation to clarify that individuals who are acting as commercial vendors are covered by the commercial vendor provisions of §§ 116.3 and 116.4. Thus, they are not covered by § 116.5, which is intended to apply to individuals extending credit or using credit cards in their personal capacities. The subsequent paragraphs of § 116.5 have been renumbered accordingly.

Finally, the Commission notes that individuals may also lend funds directly to political committees. Under both the old and new regulations, such loans are contributions until repaid, and if not repaid, such loans are contributions to the extent forgiven by the lender. 11 CFR 100.7(a)(1)(i)(B). Under new part 116 of the regulations, such personal loans must also be treated as outstanding debts, and if settled, the settlements are subject to Commission review under 11 CFR 116.7. Please note that the Commission's treatment of bank loans is discussed below in the Explanation and Justification for § 116.7.

Section 116.6 Salary Payments Owed to Employees

New § 116.6 addresses several situations which have arisen concerning unpaid salaries owed to committee staff. For example, a political committee and its campaign workers may agree that salary will be paid only as funds are available. In other cases, the committee may wish to treat the individuals as volunteers retroactively. Under section 431(8) of the Act and 11 CFR 100.7(b)(3), the value of services provided by a volunteer is not a contribution.

The language of new § 116.6 permits committees to treat the unpaid amount either as a debt owed to the employee or as volunteer services under 11 CFR 100.7(b)(3), provided the employee agrees in writing to be considered a volunteer. This decision may be made at any time, thereby allowing committees and their staffs to set up arrangements in which the staff members are paid up until the point at which the compaign is low on funding. If, on the other hand, the committee and the employee agree that the unpaid salary is to be treated as a debt, the amount owed is reportable as a debt under 11 CFR 104.3 and 104.11 and must be addressed in a debt settlement plan filed under 11 CFR 116.7. The new rules do not treat unpaid salary obligations as contributions, although the NPRM sought comments on situations in which it might be advisable to do so.

The Commission received one comment on § 116.6. The commenter stated that the Commission should avoid becoming involved in contractual disputes between committees and their employees, and supported the language in paragraph (a) which states that unpaid salaries shall not be treated as contributions. The commenter also questioned whether paragraph (b) would permit the settlement of such debts owed to employees, but would prohibit the complete forgiveness of these obligations. The new rules do permit such employees to forgive in full these unpaid amounts. Commission review of such forgiveness is not needed because the amounts would not be potential contributions, and a complete forgiveness would not adversely affect the committee's funds available to pay other creditors. The Commission notes that although an employee of a committee may become a volunteer, an individual who is an independent contractor, such as a consultant, may not convert to volunteer status. Such person is selling his or her services as a commercial vendor, and is therefore subject to the requirements of §§ 116.3 and 116.4. Consequently, an individual who is an independent contractor may agree to the settlement of a debt arising from the committee's failure to pay his or her fee, provided that such settlement is commercially reasonable and the settlement otherwise satisfies the Commission's debt settlement standards.

Section 116.7 Debt Settlement Plans Filed by Terminating Committees: Commission Review

New § 116.7 contains guidelines concerning the submission of debt settlement plans by terminating committees and explains the Commission's review procedures. For the reasons stated above, these rules differ from previous § 114.10 in that ongoing committees may no longer settle debts or file debt settlement requests. Another change is that the new regulations no longer provide for the filing of debt settlements by creditors. However, creditors wishing to write off bad debts should refer to new § 116.8, below.

New § 116.7 continues to permit terminating committees to file debt settlements once they have reached agreements with some of their creditors. Thus, the Commission has decided not to adopt the proposal published in the NPRM that would have required committees to postpone the filing of a debt settlement plan until they have reached agreements with every creditor. That approach would have enabled a single creditor to refuse to settle, thereby adversely affecting the ability of other creditors to be paid. However, the new rules encourage terminating committees to include as many proposed settlement agreements as possible in a debt settlement plan. In an appropriate case, the Commission may require the submission of additional debt settlement agreements before reviewing a terminating committee's debt settlement plan. This may be necessary to permit the Commission to conduct a realistic evaluation of the debt settlement plan.

The new rules do not establish a deadline for submitting a debt settlement for review once an agreement with a creditor has been reached. However, under new § 116.7(a), the terminating committee must postpone payment of the amount agreed to in the settlement with the creditor until the settlement has been submitted as part of a debt settlement plan and the Commission has completed its review of that plan. Please note that terminating committees are not required to settle all their debts or terminate within any prescribed amount of time. One commenter found the lack of a timetable to be troubling. Unfortunately, the establishment of an overall time limit is not feasible because different committees and different creditors may need different amounts of time to reach settlements.

The language of § 116.7(a) has been reworded from the proposals published in the NPRM to clarify that all debts and obligations must be paid, settled, forgiven, extinguished, or otherwise discharged, or become unpayable, prior to the political committee's termination.

Paragraphs (b) and (c) of § 116.7 indicate which types of debts may be settled subject to Commission review, which types may be settled but are not subject to review, and which debts may not be settled. New paragraph (b) has been added to explain that debts owed to commercial vendors, committee staff, employees, and debts arising from loans made by political committees and individuals, including candidates, may be settled and that the Commission will review such settlements. Under paragraph (c), publicly-funded Presidential candidates may not settle repayment obligations arising under 26 U.S.C. chapters 95 and 96. In addition, disputed debts are specifically excluded from the Commission's debt settlement process. This is based on current Commission policy and FEC Directive Number 3. Other debts or obligations owed to the United States government are not specifically mentioned in paragraph (b) or (c) because they may be governed by other applicable laws. Obligations to pay civil penalties are also omitted from these two paragraphs.

At the time the Commission issued the NPRM, it indicated that the revised debt settlement rules would not apply to bank loans, since the Commission does not generally consider bank loans in the debt settlement process, and does not intend to change its approach. Further guidance on this may be provided in a separate rulemaking regarding the bank loan rules at 11 CFR 100.7(b)(11) and 100.8(b)(12). *See* NPRM, 54 FR 31286 (July 27, 1989).

The reporting provisions of this section have been removed from draft paragraph (a) and placed in a separate paragraph (d) for the convenience of the reader.

Paragraph (e) sets forth a list of the information to be provided when the terminating committee submits a debt settlement plan for Commission review. From now on, the indebted committee will be required to include a signed statement from each creditor included in the plan evidencing agreement to the terms of the settlement of the debt owed to that creditor.

The wording of paragraph (e)(4) has been amended from the language presented in the NPRM to indicate that if the debt settlement plan does not provide for the settlement of all debts, the terminating committee must state how it intends to resolve all remaining debts and obligations, regardless of whether such debts may be settled. The purposes of this provision are to aid the Commission's evaluation of the debt settlements presented thus far in light of the terminating committee's overall financial picture, and to indicate how the terminating committee intends to complete its financial activities.

New paragraph (f) of § 116.7 sets out the factors the Commisson may consider in reviewing debt settlement plans. Most of these factors have been drawn from FEC Directive Number 3. They are now listed in the new rule to enable political committees and their creditors to better understand how the Commission evaluates debt settlement requests.

The Commission received one comment expressing concern that the Commission's review would be based on intuitive judgments rather than fixed standards. The Commission believes that it is impractical to establish fixed standards, given the potential for varying circumstances in debt settlement requests. However, the inclusion of these factors will offer sufficient guidance regarding the Commission's process. The commenter also stated that settlement agreements should become effective when made, and should not be delayed until completion of the Commission's review process. This concern may be alleviated, to some extent, by the Commission's decision to return to the current procedure of reviewing debt settlements as they are presented to the Commission, rather than waiting until all settlements have been reached.

New paragraph (g) has been added to this section to clarify the Commission's treatment of debts and obligations that are released through Bankruptcy Court decrees pursuant to 11 U.S.C. chapter 7. The terminating committee should attach a copy of the court order to its debt settlement plan, along with a list specifying which debts are covered by the order. For each debt covered, the terminating committee need not provide the signed affidavit from the creditor or the information regarding the initial extension of credit, subsequent efforts to collect, settlement terms, or the committee's ability to pay. However, the terminating committee is required to demonstrate that it qualifies as a terminating committee, and it must list in the debt settlement plan all debts not released, as well as the disposition of any residual funds or assets. Although a political committee may not be eligible for a chapter 7 discharge, the Commission will treat the debts as settled for FECA purposes if the candidate received a discharge under chapter 7 that applies to those debts.

116.8 Creditor Forgiveness of Debts Owed by Ongoing Committees; Commission Review

Section 116.8 establishes conditions under which creditors may forgive the outstanding balances of debts owed by committees not intending to terminate. For the reasons stated above, part 116 does not permit ongoing committees to settle debts with creditors if those committees have the ability and the intention to continue fundraising for election-related purposes. Consequently, new § 116.8 only allows creditors to forgive ongoing committees' debts if the creditors cannot locate the ongoing committees or if the ongoing committees meet certain conditions demonstrating that they are essentially defunct and clearly unable to pay their bills. An additional requirement has been added to those set out in the proposed rule: that the ongoing committee's disbursements not exceed $1000 during the previous twenty-four month period. Without this restriction, ongoing committees would be able to pay part of their debts and settle the rest simply by having the creditor declare that it has "forgiven" the outstanding balance. This section also establishes review procedures so that the Commission may ascertain whether the creditor's actions are commercially reasonable or whether the foregiveness would result in an apparent violation of the Act or the regulations.

Section 116.9 Creditors That Cannot be Found or That Are Out of Business

During the course of this rulemaking, the Commission determined that it is

advisable to address the situation where either an ongoing or a terminating committee cannot locate a creditor or the creditor has gone out of business. Consequently, new § 116.9 has now been added to permit committees in such circumstances to request that the debt be determined to be "unpayable" for purposes of the Act. Such a determination does not mean that the debt has been extinguished or is no longer owed. The political committee must demonstrate that it made the necessary efforts to reach the creditor. Once the Commission determines that a debt is "unpayable," the political committee may so indicate on its next due report, and then omit the debt from subsequent reports until there is a change in the status of the debt. Political committees with "unpayable" debts may terminate under 11 CFR 102.3.

Section 116.10 Disputed Debts

New § 116.10 has been added to the regulations to clarify the reporting of disputed debts, and to indicate what information concerning disputed debts should be included in a terminating committee's debt settlement plan.

The Commission has now revised the proposals presented in the NPRM in two respects. First, the final rule does not require the committee to report the fair market value of what was provided, since that may be in dispute. Secondly, paragraph (b) has been rewritten to more clearly state what information must be disclosed in the debt settlement plan regarding the disputed debt. The Commission received one comment on this new provision, which supported the draft rule.

Conforming Amendments

The Commission has determined that conforming amendments to §§ 100.7, 104.3, and 104.11 of the regulations are needed to clarify those provisions, and to make them consistent with the language of new part 116. One public comment was received, which supported the proposed changes to § 104.11.

The Notice of Proposed Rulemaking also suggested revising the definition of excess campaign funds in § 113.1(e) to prevent campaign committees from declaring excess campaign funds until after the campaign has ended and the committee has determined that it is not in a net debt situation. This proposal was intended to ensure that campaign funds would be used to pay for goods and services provided to the campaign rather than for a variety of political or nonpolitical purposes unrelated to the campaign. One comment opposed this revision in the absence of evidence that it is a common problem. The Commission has now concluded that the proposed language is not needed because the new requirements set out in § 116.2(c) adequately address these concerns.

Section 100.7 Contribution (2 U.S.C. 431(8))

The language of 11 CFR 100.7(a)(4) has been revised to clarify when the extension of credit, or the failure to attempt to collect the amount owed, or the settlement of a debt will result in a contribution by the creditor. The revised language more closely parallels the requirements set out in new 11 CFR part 116. In addition, new cross-references to 11 CFR 116.3 and 116.4 have been included to replace the current cross-references to 11 CFR 114.10.

Section 104.3 Contents of Reports (2 U.S.C. 434(b))

There are no substantive changes in this section. However, in paragraph (d), the cross-reference to previous § 114.10 has been revised to refer to new § 116.7.

Section 104.11 Continuous Reporting of Debts and Obligations

The Notice of Proposed Rulemaking sought comments on possible conforming amendments to 11 CFR 104.11(b), which concerns continuous reporting of debts and obligations. The Commission has now decided to make several changes to this regulation. First, the new language clarifies that debts exceeding $500 should be reported as of the date the debts are incurred. The current language says "as of the time of the transaction." Second, as the NPRM indicated, for amounts exceeding $500, disclosure is currently required for "any loan, debt or obligation," whereas for smaller amounts committees must disclose any "debt, obligation or other promise to make an expenditure." The revised language makes these two provisions consistent, since in practice the Commission has not drawn distinctions between these two categories. The revisions also clarify that periodic administrative costs incurred for rent and staff salaries need not be reported as debts if payment is not due before the end of the reporting period. However, if payment is not made on the due date, the amount outstanding must be reported as a debt. Finally, new language is also included which follows the current policy that if the exact amount of a debt is not known, the committee should report an estimated amount on schedule D, and then either amend the report or include the correct figure in a subsequent report when the exact amount has been determined. *See* AO 1980–38.